

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE MALIK MANGHAM

Defendant-Appellant.

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UNPUBLISHED

December 17, 2013

No. 312404

Wayne Circuit Court

LC No. 12-002948-FC

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to 66 to 180 months' imprisonment for armed robbery and to two years' imprisonment for felony-firearm. We affirm.

Defendant first contends that the prosecution presented insufficient evidence to convict him of felony-firearm. Specifically, defendant argues that because the victim, Megan Dickens, provided allegedly unreliable testimony, the felony-firearm charge was not proven beyond a reasonable doubt. We disagree.

In a challenge to a criminal conviction based on insufficient evidence, this Court reviews the record de novo. *People v Kloosterman*, 296 Mich App 636, 639; 823 NW2d 134 (2012). This Court analyzes whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *Id.* Sufficient evidence existed for a reasonable jury to convict defendant of felony-firearm.

“To be guilty of felony-firearm, one must carry or possess [a] firearm, and must do so when committing or attempting to commit a felony.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (italics removed). In cases where the firearm used in the commission of a felony is never actually recovered, possession of the firearm “may be proven without the actual admission into evidence of the weapon.” *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Significantly, Dickens testified that defendant asked his codefendant to hand him “the pistol” after Dickens initially refused to give defendant her telephone. Dickens also testified that

defendant proceeded to point an automatic pistol into her stomach. Although Dickens testified at the preliminary examination that she may not be able to tell the difference between a facsimile pistol and an actual pistol, she believed the firearm was real at the time of the robbery. As noted above, recovery of the actual firearm used in the commission of the robbery was not required in order to prove felony-firearm. *Id.* The jury apparently found Dickens’s testimony credible, including the testimony regarding possession of a pistol by defendant. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a reasonable jury to conclude that defendant possessed a firearm when he robbed Dickens.

Defendant next argues that he is entitled to resentencing on the armed-robbery conviction because there were scoring errors regarding Offense Variables (OVs) 1 and 2. Specifically, defendant contends that he should have been assessed zero points for OVs 1 and 2 because there was no evidence that an actual firearm was used in the commission of the robbery.<sup>1</sup>

“Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). This Court reviews de novo whether the facts, as found, were adequate to satisfy the scoring conditions prescribed by statute. *Id.* We find no basis upon which to provide the requested relief of resentencing.

OV 1 is the variable relating to the aggravated use of a weapon. MCL 777.31(1); *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). OV 1 is applicable when, among other instances, a defendant’s crime is against another person. MCL 777.22(1). If multiple offenders are convicted of the same crime, each offender must be assessed an equal number of points. MCL 777.31(2)(b); *Morson*, 471 Mich at 258-259. Fifteen points must be assessed when “[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon[.]” MCL 777.31(1)(c). When “[t]he victim was touched with any other type of weapon,” ten points must be assessed. MCL 777.31(1)(d).

OV 2 is the variable relating to the lethal potential of a weapon possessed or used in the commission of a crime. MCL 777.32(1); *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). Consistent with OV 1, OV 2 applies to offenses against other persons, and each offender must be assessed the same number of points if multiple offenders committed the crime. MCL 777.22(1); MCL 777.32(2). Five points must be assessed under OV 2 if, during the commission of a crime, “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon[.]” MCL 777.32(1)(d).

Defendant’s argument—that because there was no evidence to prove he possessed and used an actual firearm during the robbery, the assessment of points under OV 1 and OV 2 was erroneous—is without merit. As noted above, there was sufficient evidence presented at trial to prove that defendant possessed and used a pistol during the armed robbery of Dickens, and in convicting defendant of felony-firearm, the jury necessarily concluded that defendant used a

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<sup>1</sup> Defendant received ten points for OV 1 and five points for OV 2.

pistol during his crimes. See, e.g., *Burgenmeyer*, 461 Mich at 438 (firearm required for felony-firearm conviction). Dickens testified that defendant and the codefendant approached her, defendant asked the codefendant to hand him a pistol, and defendant pushed the gun into Dickens's stomach during the commission of the robbery. Dickens also testified that the pistol was an automatic pistol and that she believed the firearm was authentic. No evidence was presented to suggest that the firearm was a facsimile, and it was a reasonable inference that the weapon used to facilitate the robbery and referred to by defendant as a "pistol" was in fact real.

The prosecution correctly points out that defendant actually received an erroneously *low* score for OV 1; defendant should have been assessed 15 points. Defendant "pointed at or toward" Dickens with the pistol, which requires an assessment of 15 points under MCL 777.31(1)(c). Further, the codefendant received 15 points for OV 1, and the statute requires that all codefendants receive an equal number of points for the same offense. It appears that defendant's score of ten for OV 1 was simply a mistake on the part of the prosecution at defendant's sentencing hearing. In any event, there is no basis for defendant's argument that the scores for OV 1 and OV 2 should have been zero, and appellate relief is therefore unwarranted.

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad